No. 79-521

In the Supreme Court of the United States

OCTOBER TERM, 1979

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.,
PETITIONERS

v.

GTE SYLVANIA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondents' brief begins with a lengthy and highly critical description of the Consumer Product Safety Commission's investigation into possible safety hazards associated with television receivers (Resp. Br. 2-8). In painting its negative picture, however, the brief conveniently ignores the single feature of the disputed "TV-related accident" reports that is most salient to the present controversy. The consumer complaints submitted by television manufacturers to the Commission in response to its requests are not business data or records prepared by the manufacturers in the course of their business activities; they are reports initially submitted to the manufacturers by members of the public who have experienced difficulties with the manufacturers' products. Similar reports concerning various consumer products are frequently submitted by the public directly to the

Commission, and there is no evidence in the record that persons reporting TV-related accidents to manufacturers have any objection to the submission of their information to the Commission or to the Commission's subsequent release of the accident reports to a Freedom of Information Act requester.

Respondents have, of course, asserted (Resp. Br. 3, 7) that the accident reports are confidential and that they are exempt from mandatory disclosure under the FOIA because they fall within the statutory category of "trade secrets and commercial or financial information * * * [that is] privileged or confidential" (5 U.S.C. 552(b)(4)). But neither the district court nor the court of appeals has accepted respondents' assertions, and respondents cannot convert the accident reports into trade secrets or confidential business data simply by applying those labels.

If the Commission prevails in this Court and Section 6(b)(1) of the Consumer Product Safety Act does not modify the Commission's mandatory duty of disclosure under the FOIA, the appropriate course would be a remand for consideration of respondents' arguments that release of the "TV-related accident" reports violates the Trade Secrets Act, 18 U.S.C. 1905, or is an abuse of agency discretion under the Administrative Procedure Act, 5 U.S.C. 706(2)(A), because it involves the unjustified dissemination of material exempt from mandatory disclosure under Exemption 4 of the FOIA, the so-called "trade secret exemption." See 5 U.S.C. 552(b)(4). Until that time, however, it ill befits respondents to seek a resolution of the current dispute on the basis of their own unsupported representations that the documents in question are confidential.

2. Respondents contend vigorously (Resp. Br. 15-22) that "there is no rational way to distinguish between so-called 'affirmative' and 'passive' disclosures of information by the [Commission]" (*id.* at 22). The thrust of this argument is unclear. Respondents may mean that they do not understand the classifications advanced by the Commission and the sorts of disclosures falling in each category. The distinction is readily apparent. On the one hand, the Commission may issue reports, analyses, press releases, research studies, or other material that it represents as reflecting its own conclusions about the possible hazards associated with particular products. In such instances, the Commission is likely to give the materials a wide distribution in an effort to educate the consuming public about what the government has learned. On the other hand, the Commission may release specific documents to a person who requests them under the FOIA. In such instances, the Commission would not release the materials at all in the absence of a request, the Commission's distribution is limited to the requester, and the Commission makes no representation whatever, either express or implied, concerning its views on the accuracy or reliability of the documents requested.[1]

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[1]Respondents erroneously assert (Resp. Br. 21) that, if the Commission's distinction between disclosures under the FOIA and other disclosures undertaken at the Commission's own initiative and with the Commission's endorsement is accepted, it will permit the Commission "to disclose inaccurate or misleading information identifying a manufacturer any time it wishe[s] merely by issuing an accompanying statement that it [is] not vouching for or 'endorsing' the accuracy of the information." This argument ignores the mandatory nature of an agency's duty under the FOIA. When the Commission or any other government agency responds to a FOIA request, it does so not because it "wishes" to respond but because the FOIA compels it to respond. A release of information under the FOIA does not occur at the agency's initiative, much less at the agency's whim.

This Court may decide that the distinction between "affirmative" and "passive" disclosures cannot bear the significance that the Commission ascribes to it, but the distinction is surely not artificial. It is the same distinction noted by Professor Ernest Gellhorn in a law review article on which respondents rely (Resp. Br. 20). See Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 Harv. L. Rev. 1380, 1421-1422 (1973). The article states (*ibid.*) (footnote omitted):

> Before proposing methods for controlling the use of agency publicity, one must distinguish such controls from agency information practices that permit public access to agency records in accordance with the Freedom of Information Act. The latter involves [*sic*] a question of the availability of government information to the public. Agency publicity, on the other hand, involves affirmative action on the part of an agency or its personnel to bring information or activities to the attention of the public.[2]

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[2]Respondents attempt (Resp. Br. 22 & n.17) to distinguish *Pierce & Stevens Chemical Corp.* v. *CPSC*, 585 F. 2d 1382 (2d Cir. 1978), on the ground that in that case the requested inspection reports were generated by the government whereas here the information requested was obtained from the television manufacturers. Although respondents suggest that the circumstances in *Pierce & Stevens* made it easier for the court of appeals to sustain the Commission's reading of Section 6(b)(1), the factual distinctions between the two cases cut in precisely the opposite direction. If anything, the inspection reports at issue in *Pierce & Stevens* were more likely to be thought to represent the government's views than the unevaluated consumer accident reports involved here. Nonetheless, the court of appeals in *Pierce & Stevens* concluded correctly, in the Commission's view that, because no agency approval or endorsement attaches to materials disclosed under FOIA, the procedural requirements of Section 6(b)(1) do not apply in that context.

The other possible meaning of respondents' objection to the distinction between "affirmative" and "passive" disclosures is that, although the distinction is understood and acknowledged in theory, it is without practical importance because a release of information by the Commission has the same or nearly the same effect whether the Commission acts on its own initiative or in response to a FOIA request from a member of the public. Predictions concerning the probable consequences of releases of information that have not yet occurred are unavoidably speculative, but respondents' contention seems inconsistent with both experience and common sense. Respondents strain credulity when they suggest that the release to a FOIA requester of consumer product complaints obtained by the Commission directly or indirectly from members of the public will have the same impact as a public announcement by the Commission that it has determined a particular product unsafe on the basis of a detailed inquiry. The accident reports in the present case were submitted to television manufacturers six to 11 years ago; in many if not most cases, they concern television models no longer on the market. The members of the public who sent the reports to the manufacturers did not purport to be experts in product safety; they merely recounted particular incidents involving the television sets they themselves owned. It is difficult to accept respondents' assertion that the release of such consumer complaints to a FOIA requester (even a requester who might distribute them more broadly) would have a practical effect indistinguishable from the Commission's dissemination of its own report on television safety.

3. Respondents' arguments concerning the statutory language and legislative history of the Consumer Product Safety Act (Resp. Br. 22-35) focus on the words "public disclosure" in Section 6(b)(1) and insist that those words must encompass releases of information under the FOIA. Respondents fail, however, to address the overall structure of the Act and its pervasive emphasis on the Commission's functions of collecting, analyzing, and distributing product safety information.

As we have explained at length in our main brief (Br. 15-23), Congress has directed the Commission to gather information and disclose it to the public, even if no one asks for the information. The Commission's statutorily prescribed role is to educate and warn consumers about possible safety hazards associated with particular products. The disclosure of information is thus an affirmative part of the Commission's duties, and it is such disclosures to which Section 6(b)(1) refers. When the Commission performs its statutory tasks, a representation of accuracy and reliability is implicit in its public disclosures about consumer products. By contrast, when the Commission simply complies with the FOIA and releases consumer complaints in response to a request, no such representation is expressed or implied. The Commission merely carries out a largely ministerial duty common to all government agencies and not specifically related to product safety.

In sum, the phrase "public disclosure" as it is used in Section 6(b)(1) cannot be understood outside the context of the Act as a whole and the purposes for which the statute was passed. The disclosures to which the phrase refers are the disclosures that the Commission was created to make, not the disclosures it makes under the FOIA in its capacity as one of many government agencies.

The foregoing argument is strongly supported by the fact that, although Congress has granted broad information gathering power to numerous other agencies,[3] all of which are covered by the FOIA, it has imposed the restrictions of Section 6(b)(1) only on the Commission, the only agency charged with the statutory responsibility of disseminating product safety information to the public. The implication is obvious. Section 6(b)(1) was needed not to prevent abuses under the FOIA (the FOIA's own exemptions and the Trade Secrets Act are adequate to that task, just as they are adequate with respect to other government agencies), but to ensure that, when the Commission proposes to release product safety information supported by the weight of governmental authority and the Commission's own endorsement, it will do so only after offering affected manufacturers a reasonable opportunity to comment and only after taking reasonable steps to assure that the information is accurate.

Respondents maintain (Resp. Br. 26-27), however, that Section 25(c) of the Consumer Product Safety Act, 15 U.S.C. 2074(c), demonstrates the congressional intent to require compliance with Section 6(b)(1) as a precondition to any release of information by the Commission under the FOIA. Section 25(c) demonstrates no such thing, and

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[3]The following statutes are examples of provisions conferring broad information gathering powers on government agencies: 15 U.S.C. 46(a), (b), 49 (Federal Trade Commission); 15 U.S.C. 78u (Securities and Exchange Commission); 29 U.S.C. 161(1), (2) (National Labor Relations Board); 29 U.S.C. 657(a)-(c) (Occupational Safety and Health Administration); 46 U.S.C. 826(a) (Federal Maritime Commission); 47 U.S.C. 409(e)-(h) (Federal Communications Commission); 49 U.S.C. 12(1)-(4) (Interstate Commerce Commission). None of these statutes is accompanied by a provision requiring that the agency ensure the accuracy of any information released under the FOIA.

Congress had no such intent. The meaning of Section 25(c)'s references to Section 6 becomes clear when the two statutory provisions are examined side by side.

Section 6 of the Act is entitled "Public disclosure of information" and is unrelated to the FOIA. Section 6(a)(1) emphasizes this independence by providing that nothing in the Act should be construed to *require* the Commission, in performing its statutory duties, to release information exempt from mandatory disclosure under the FOIA. Section 6(a)(2) does not refer to the FOIA at all but simply prohibits public disclosure by the Commission, at its own initiative, of information that "contains or relates to a trade secret or other matter referred to in [18 U.S.C. 1905] * * *."[4] Section 6(b) also does not refer to

[4]Respondents incorrectly assert (Resp. Br. 24 n.19) that the Commission conceded in its opening brief that Section 6(a)(2) applies to FOIA requests. No such concession was made at the pages cited by respondents or anywhere else in the brief. Section 6(a)(2), like the rest of Section 6, addresses only the problem of disclosures undertaken by the Commission at its own initiative and with its implicit or explicit "seal of approval." The subsection was added to the Act to reassure manufacturers and labelers that the statutory mandate in favor of public disclosures of product safety information by the Commission would not override the prohibitions of 18 U.S.C. 1905 and authorize the Commission to make disclosures of trade secrets or other protected information acquired by the agency in the performance of its information-gathering responsibilities. See H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 31-32 (1972).

The inapplicability of Section 6(a)(2) in the FOIA context does not mean, of course, that the Commission may reveal trade secrets in response to FOIA requests whenever it chooses to do so. On the contrary, as this Court has recently made clear in *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317-318 (1979), the Trade Secrets Act, 18 U.S.C. 1905, "place[s] substantive limits on agency action" under the FOIA. The Commission, therefore, like every other federal agency, must take account of the criminal prohibitions of Section 1905 before it proposes to release "trade secret" materials in response to a FOIA

the FOIA and, as the Commission has argued, establishes procedural rules for public disclosures originated by the Commission and bearing its imprimatur.

Section 25 of the Act, by contrast, is entitled "Private remedies." As the committee report cited by respondents shows (Resp. Br. 26 n.25), this Section was intended to prevent the Commission from denying FOIA requests for certain materials on the basis of any of the exemptions from mandatory FOIA disclosure that generally are preserved by Section 6(a)(1) of the Act. Section 25(c) requires the Commission to make available to the public two categories of information, notwithstanding any FOIA exemption that otherwise might be available. Those two categories are "any accident or investigation report made * * * by an officer or employee of the Commission" and "all reports on research projects, demonstration projects, and other related activities * * *." The reference to Sections 6(a)(2) and 6(b) in Section 25(c) was intended simply to make clear that, although the Commission is precluded from asserting any FOIA exemption with respect to the covered materials, it is not relieved of the obligation to comply with the requirements of Section 6 should it decide to make an affirmative public disclosure of any research report or any accident or investigation report prepared by a Commission employee. The opening phrase of Section 25(c)—"[s]ubject to sections 6(a)(2) and 6(b)"—is designed not, as respondents contend, to reflect the applicability of specified portions of Section 6 to

request. Accordingly, the inapplicability of Section 6(a)(2) in the FOIA context does not create any "loophole" authorizing the Commission to reveal trade secrets to a FOIA requester when it could not disseminate such information to the public through an affirmative disclosure of the kind treated in Section 6 of the Act.

certain FOIA requests, but to avoid any potential misimpression that the unavailability of the FOIA exemptions with respect to certain materials authorizes the Commission to make *affirmative* disclosures of those materials without complying with Section 6. Section 25(c) is thus completely consistent with the Commission's interpretation of Section 6 and does not create any internal contradiction of the kind purportedly identified by respondents.

4. Respondents reprimand (Resp. Br. 45-46 & n.62) the Commission for omitting from its opening brief a discussion of Exemption 3 of the FOIA (5 U.S.C. 552(b)(3)) and the relationship of that exemption to Section 6(b)(1). Such a discussion is unnecessary and indeed irrelevant in view of the Commission's argument that Section 6(b)(1) simply does not apply in the FOIA context. If that argument is rejected and the decision of the court of appeals is affirmed, the Commission will be required to follow the procedural steps prescribed by Section 6(b)(1) before releasing any information in response to a FOIA request. The delay and temporary withholding that will inevitably result from this requirement will, of course, not violate the FOIA. Stated another way, if this Court determines that Section 6(b)(1) applies in the FOIA context, the Court's decision will necessarily comprise a ruling that any departure from the disclosure provisions of the FOIA occasioned by the need to comply with Section 6(b)(1) will not be subject to attack under the FOIA.[5] The relevant inquiry, therefore, is not whether

[5]As we have explained in our opening brief (Br. 30-32 and n.13), a holding that Section 6(b)(1) does apply in the FOIA setting would raise several serious practical problems. If the number of FOIA requests is sufficiently large, the Commission would be unable, with its existing resources, to take the necessary "reasonable steps" to assure the accuracy of the requested materials. If the Commission simply denies some FOIA requests because of this inability, it would almost certainly be sued by some requesters, who could be expected to argue that the Commission has no choice but to undertake the investigation described in Section 6(b)(1). Similarly, if the Commission discovers, in the course of a Section 6(b)(1) inquiry, that certain requested material is probably inaccurate and denies the outstanding FOIA request on that ground, the requester may well commence a legal action challenging the Commission's authority to withhold information on the basis of Section 6(b)(1), which, on its face, contemplates disclosure rather than nondisclosure. These knotty problems can best be avoided by recognizing the correctness of the position taken by the Commission throughout this litigation, namely, that Section 6(b)(1) does not apply in the FOIA context.

Section 6(b)(1) "specifically exempt[s information] from disclosure" within the meaning of Exemption 3 of the FOIA but whether Congress intended the procedural protections of Section 6(b)(1) to govern the Commission's response to a FOIA request. The answer to the latter question is dispositive of the outcome in this case.

5. Respondents have been unable to explain away the Conference Committee Report accompanying the addition of Section 29(e) to the Act in 1976. Respondents' contentions in this regard are not entirely clear but it appears that, because the applicability of Section 6(b)(1) to FOIA requests is not discussed elsewhere in the legislative history of the 1976 amendments, respondents would simply ignore the Conference Committee's comments on the subject and would do so not only in connection with Section 6(b)(1) but even in connection with Section 29(e) itself. Respondents have offered no justification for this cavalier disregard of what is ordinarily considered the most useful and reliable component of a statute's legislative history.

The point made at the conclusion of the Commission's opening brief thus remains unanswered. If the information involved in this case had been given to another federal agency under Section 29(e), the Conference Committee Report makes clear that the other agency would be required to disclose the information in the event of a FOIA request (subject, of course, to possible FOIA exemptions) without any need for compliance by the disclosing agency or the Commission with Section 6(b)(1). Under respondents' interpretation of the Act, however, the Commission itself would be forced to satisfy Section 6(b)(1) before complying with the identical FOIA request. Congress could not have intended such an incongruous result, and the proper way to avoid the problem is not to ignore the 1976 Report but to follow it in applying both Sections 6(b)(1) and 29(e).

For these reasons and the reasons stated in the Commission's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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